No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE LORAIN JOURNAL COMPANY, SAMUEL A. HORVITZ, ISADORE HORVITZ, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court for the Northern District of Ohio, Eastern Division (R. 505) is reported in 92 F. Supp. 794.

JURISDICTION

The judgment of the district court was entered on January 5, 1951 (R. 534). The petition for appeal was allowed on January 8, 1951 (R. 538). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17

of the Act of June 25, 1948, 62 Stat. 869, 15 U. S. C., Supp. IV, 29. Probable jurisdiction was noted on April 30, 1951 (R. 547).

QUESTIONS PRESENTED

The only daily newspaper in Lorain, Ohio, is published by appellants, and its only daily competitor in Lorain is the sole local radio station. The newspaper and the radio station are the only outlets in Lorain for the daily dissemination of news and advertising which flow regularly into that city from outside the state. The radio station's broadcasts are regularly heard in Michigan, and it serves as the final link in the interstate transmission of programs originating outside of Ohio. Appellants attempted to destroy the radio station by refusing to publish advertisements and cancelling advertising contracts of Lorain merchants who advertised or proposed to advertise over the radio station, thereby coercing merchants to boycott the station. The district court enjoined refusal by the newspaper to publish advertisements where the reason for such refusal is that the prospective advertiser uses any other advertising medium. The questions presented are:

1. Whether appellants sought to monopolize the outlets for the daily dissemination of interstate news and advertising in Lorain.

2. Whether the Lorain radio station is engaged in interstate commerce, and whether appellants'

activities against that station violated Section 2 of the Sherman Act.

3. Whether the relief ordered constitutes an abridgment of the freedom of the press, or is otherwise improper.

CONSTITUTIONAL AMENDMENT AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> Congress shall make no law * * * abridging the freedom * * * of the press * * *.

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SEC. 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * [15 U. S. C. 1].
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * [15 U. S. C. 2].

* * * * *

> SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations * * * [15 U. S. C. 4].

STATEMENT

Appellants are a newspaper publishing corporation and three of its principal officers and employees who have been enjoined by the court below from certain activities found to be in furtherance of an attempt to monopolize interstate trade and commerce in news and advertising in violation of Section 2 of the Sherman Act. Appellant The Lorain Journal Company (hereinafter referred to as the "corporation") publishes in Lorain, Ohio, a daily (excluding Sunday) newspaper of general circulation known as the "Journal and Times-Herald" (hereinafter referred to as the "Journal") (Fdg. 3, R. 529). Appellant Samuel A. Horvitz has been Vice President, Secretary, and a director of the appellant corporation since early 1934, and prior to that time was President of the corporation (Fdg. 4, R. 529). Appellant Isadore

Horvitz has been President, Treasurer and a director of the appellant corporation since early 1934, and prior to that time was its Vice President (Fdg. 5, R. 529–530). Appellant Self has been Business Manager of the Journal since March 1947 (Fdg. 6, R. 530).[1]

THE PROCEEDINGS BELOW

By its complaint filed on September 22, 1949, the United States sought injunctive relief to restrain appellants from violating Sections 1 and 2 of the Sherman Act. The complaint alleged, *inter alia,* that appellants had engaged in an attempt to monopolize, and a combination and conspiracy to restrain, interstate trade and commerce in news and advertising (R. 1, 4–9).

Trial was had in March 1950, and in August 1950 the district court (Judge Freed sitting) filed an opinion holding that the charge of attempting to monopolize interstate trade and commerce in violation of Section 2 of the Sherman Act had been established (R. 505).[2] It concluded that the defendants had utilized the monopoly

[1] A fourth individual defendant, Frank Maloy, who was the Editor of the Journal (Fdg. 7, R. 530), died during the pendency of this appeal.

[2] The district court found it unnecessary to reach the question whether the defendants had also violated Section 1 since it was of the view that the injunctive relief to be ordered would be the same whether one or both sections had been transgressed (R. 513).

position of the Journal in Lorain to coerce advertisers to boycott Radio Stations WEOL and WEOL-FM (R. 508). In the main this coercion was effected, the court found, by refusal to permit those who advertise through the radio station to advertise in the Journal (R. 506-7).

Findings of fact, conclusions of law, and a final judgment were entered on January 5, 1951 (R. 529-534). Appellant corporation was enjoined from refusing to accept advertisements for the reason that the prospective advertiser utilizes other advertising media, and from conditioning acceptance of advertisements upon any agreement by the advertiser which would restrict its use of such media (Sec. III, R. 535). Appellant corporation was required to insert in the Journal, at least once a week for a period of twenty-five weeks, a notice apprising its readers of the substantive terms of the judgment (Sec. IV, R. 536), and to maintain for five years records of matters relating to the subject matter of the judgment (Sec. V A, R. 536). The Department of Justice was given the customary visitorial rights as to these records for the purpose of securing compliance with the judgment (Sec. VI, R. 536).[3]

[3] An application for a stay of the judgment pending appeal was denied, except as to Sections IV and V B which require notification to the public and Journal employees of the terms of the judgment (R. 540).

THE EVIDENCE

a. The monopoly position of the Journal in the Lorain daily newspaper field

The court below concluded that the position of the Journal in the city of Lorain is a "commanding and an overpowering one" (R. 505). The city of Lorain, Ohio, has approximately 52,000 inhabitants (*ibid.*). The total daily circulation of the Journal is approximately 20,690 copies, of which 13,151 are distributed in the city of Lorain, Ohio, 7,374 are shipped elsewhere in the State of Ohio, and the remaining 165 are shipped from Lorain to subscribers located outside Ohio (Fdg. 10, R. 530). It is the only newspaper of general daily (excluding Sunday) circulation published in Lorain and reaches 99 percent of the families in that city (Fdg. 8, R. 530).[4] The

[4] This has not always been the case. Prior to 1933, a competing daily newspaper known as the Times Herald was published and circulated in Lorain. In December 1932, the assets of this paper were acquired by appellant corporation, appellant Samuel A. Horvitz, and The Mansfield Journal Company, a corporation (Fdg. 9, R. 530). The importance to the appellant corporation of this elimination of competition was clearly stated at a meeting of its Board of Directors on December 9, 1946. The minutes state that the President, appellant Isadore Horvitz, reported that (R. 87):

"* * * consummation of the transaction which gave rise to the mortgage indebtedness [incurred in connection with the purchase, Gov. Ex. 137, R. 389, not printed] was a fortunate move on the part of the officers and directors, that prior thereto the company, in the face of competition from another newspaper, had experienced very material operating losses, and that thereafter, with *the elimination of competi-*

Journal has no substantial competition from any daily newspaper in the dissemination of news and national advertising in the city of Lorain (Fdg. 12, R. 530). Three Cleveland newspapers circulate in the city of Lorain, but the Journal enjoys more than two-thirds of the combined weekday Lorain circulation of the four newspapers.[5] And the Journal is without newspaper competitors as a medium for the dissemination of advertising by Lorain merchants except for the extremely limited competition provided by the Lorain Sunday News, a Sunday newspaper with a weekly circulation of 3,167 in Lorain (Fdg. 11, R. 530).[6]

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tion, the company enjoyed a profitable operating experience." [Emphasis supplied.]

[5] The county circulation figures cited by appellants (Br. 4–5) are obviously irrelevant to the question of whether the Journal was the dominant daily paper in the city of Lorain. The daily (excluding Sunday, on which day the Journal does not publish) circulation of the four papers in the city of Lorain is as follows:

Journal	13,151	(Gov. Ex. 119, R. 472)
Cleveland Plain Dealer	*4,742	(Gov. Ex. 149, R. 490)
Cleveland News	735	(Gov. Ex. 148, R. 487)
Cleveland Press	571	(Gov. Ex. 147, R. 485)
Total	19,199	

*Mr. Barnett, managing editor of the Cleveland Plain Dealer, a morning paper, testified that his paper carries an average of not more than 450 words per issue of news pertaining to Lorain (R. 348).

[6] The Chronicle-Telegram, a daily (excluding Sunday) newspaper of general circulation, is published eight miles away in Elyria, Ohio, but that newspaper is not distributed in Lorain, although the Journal is sold in Elyria (Gov. Ex. 62, not printed).

b. The use of the Journal's monopoly power to coerce Lorain merchants to boycott WEOL

Despite the dominant position of the Journal in the Lorain newspaper field, appellants have for some years been concerned with the possibility of competition from radio as an advertising medium. In 1945 appellant corporation sought to establish a radio station in Lorain but was denied a license by the Federal Communications Commission (R. 433, 506). See *Lorain Journal Co.* v. *Federal Communications Commission,* 180 F. 2d 28 (C. A. D. C.). And at a meeting of the Board of Directors of appellant corporation held on December 9, 1946, appellant Isadore Horvitz stated (R. 87):

> Though presently enjoying a quasi-monopolistic position with respect to the newspaper, it is pertinent to consider that such may not always be the case, and that the company can always expect an attempt on the part of others to encroach upon its field of operation through establishment of a competing newspaper *or other advertising mediums,* with resultant adverse effect on the company. In view of such an ever-present contingency it is very essential that the company carefully husband its resources in order that it may at all times be in a position to protect its interests. [Emphasis supplied.]

In 1948 the Federal Communications Commission licensed the Elyria-Lorain Broadcasting

Company—an independent corporation having no connection with appellants—to broadcast from Lorain and Elyria (a town eight miles from Lorain) (R. 25). Since October 1948 that company has been broadcasting daily from Lorain and Elyria over Stations WEOL and WEOL-FM (herein referred to collectively as "WEOL") (Fdg. 13, R. 530), and it competes, or attempts to compete, with appellant corporation in the dissemination of news and advertising (Fdg. 14, R. 530).[7]

The district court found that at all times since WEOL commenced broadcasting it has been the purpose and intent of appellants to prevent the Elyria-Lorain Broadcasting Company from obtaining any advertising revenue from Lorain merchants and thereby to destroy the company (Fdgs. 16, 17, R. 531).[8] The court further found

[7] The district court found that substantially all the income of the Elyria-Lorain Broadcasting Company is derived from payments for its broadcasts of advertisements for the sale of goods and services (Fdg. 24, R. 532).

[8] While the gross income of WEOL from all sources in 1949 amounted to $175,000 (R. 46), the Journal's gross income for the same period from advertising alone amounted to more than $650,000 and its gross income from circulation exceeded $250,000 (Gov. Ex. 254, R. 491-2). Compare appellants' characterizations of WEOL as "the Government's interstate (!) Goliath" and the Journal as "the local David" (Br. 27). WEOL's net profit from its total operation in that year was $2,600 or $2,700 (R. 46). Financial statements of the Journal indicating its net profit for a comparable period were offered in evidence by the Government but excluded when appellants

that appellants monitored the programs of WEOL to learn who was using its advertising facilities, and thereafter cancelled the advertising contracts between appellant corporation and a number of Lorain County advertisers who had facilities, and thereafter cancelled the advertising over WEOL (Fdg. 18, R. 531). Moreover, advertisers were informed that they could not advertise in the Journal if they advertised over WEOL, and appellants refused to accept advertising copy proffered by Lorain County merchants who were advertising over WEOL (*ibid.*). As a result of appellants' activities, the court found, many advertisers discontinued the use of WEOL (Fdg. 19, R. 531).

The principal evidence in support of the above findings is as follows:

Joseph Kelly, who served as classified advertising manager of the Journal in 1948, testified that appellant Self told him that "advertisers that were using the Radio Station WEOL in Elyria should be approached and asked for their cooperation in discontinuing the radio advertising" (R. 116). If such cooperation should not be forthcoming, the advertisers "would be notified that drastic methods would be taken to do

objected (R. 153–8, 466–8). They were proffered by the Government and placed under seal by the district court in the event the reviewing court should believe they were material (R. 467–8).

something about it" (*ibid.*).[9] Appellant Self admitted that Journal advertisers were told that they could not continue to advertise in the newspaper if they advertised over WEOL (R. 382). Self also admitted that he had written letters cancelling, after the expiration of thirty days from the date of each of the letters, contracts with 15 advertisers in the Journal whom he understood "were or would start" advertising over WEOL (R. 378–9).

Appellant Samuel Horvitz testified on direct examination that he instructed the Journal staff to tell any persons who wished to advertise on the radio that it was suggested that they concentrate upon the radio as a medium of advertising, and that appellant corporation would be willing to waive its contracts with advertisers wishing to use WEOL (R. 418–9). The record makes clear that this was more than a mere accommodation to the advertiser desiring to switch advertising media, for the witness added that he told the staff that if such advertisers did not wish to request a waiver of their contracts for Journal advertising, "to tell them in order for them to give the radio station a fair trial that

[9] Mr. Kelly was discharged as a Journal employee by appellant Self, and it was brought out on cross-examination that he resented Mr. Self's actions (R. 119–20). It is significant, however, that appellant Self did not take the stand to deny or explain Mr. Kelly's testimony.

we would cancel their contract" (*ibid.*)[10]. And on cross-examination the witness flatly admitted that unless bound by contract to do so, the Journal refuses to publish advertisements of Lorain merchants who advertise over WEOL (R. 443).[11]

Thirty-three Lorain County advertisers testi-

[10] The standard form local advertising contract of the Journal contains a clause reading as follows: "This contract may be cancelled by the publisher upon thirty days written notice" (Gov. Ex. 151, not printed). But it should be noted that at least four advertisers testified that advertisements submitted by them for publication in the Journal during the thirty-day period after notice of termination were not published (R. 198–9, 211, 226, 360–1), and two testified that they were never informed their contracts had been cancelled until after they noted that their regular advertisements were not in the Journal, or until the Journal representative discontinued his usual visits to pick up the advertising copy (R. 226, 263).

[11] The record also makes clear that Lorain advertisers considered appellants' action to be coercive rather than accommodating in nature (*e. g.*, R. 172–3, 175, 199–200, 210, 360–1). The following testimony of Mr. George Llewellyn, a Pontiac dealer in Lorain, describing a discussion of the Journal policy with the defendant Frank Maloy, is illustrative (R. 311–12):

"A. I said, 'Is this true?' and he said, 'Yes, we believe it's our right to reject or accept any advertising, and this is a policy.' And I said, 'Well, Frank, gee whiz, you mean you wouldn't accept my advertising if I went on the air?' 'That's right.' 'Well,' I said, 'Heck, I have got a right to spend my money for advertising the way I please.' And he said, 'Well, it's our policy and I resent your intrusion into this policy in the operation of our business.'

"Q. Did you offer any explanation as to why you were intruding, as he put it?

"A. Well, I actually was there as—I was personally president of the Lorain County Auto Dealers Association, and I

fied as to the manner in which the Journal's policy was enforced against them.[12] At least twenty-two of these advertisers testified explicitly that, after being apprised of the Journal's policy by its representatives, they elected to advertise in the Journal and therefore either stopped advertising, or abandoned their plans to advertise, over WEOL.[13] Seventeen testified that they desired to use WEOL as well as the Journal as an advertising medium,[14] and appellants were fully aware of this desire (R. 383–4). Two advertisers testified that they were placed at a competitive disadvantage as a result of not being able to do so (R. 200, 218). Only four stated that they remained with WEOL (R. 241–5, 255, 304, 327–8).

Illustrative of the firm position taken by ap-

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wanted to get the full story so we could present it at a meeting of the auto dealers, which did subsequently follow. But to get back to this conversation, the next thing that developed was that he became angry over my questioning him and he told me, 'You keep your nose out of it until such time as you are directly affected with it.' And I said, 'Hell, that's what Hitler and Stalin did,' and I said, 'I don't think that's a proper policy, Frank, and for my money your policy stinks.'"

[12] This testimony was undisputed. No employees of the appellant corporation were called by the defense to rebut or explain the coercive acts attributed to them by Government witnesses.

[13] R. 175, 179, 182–3, 186–8, 190–4, 208–12, 216–18, 220–1, 227, 229–30, 230–4, 247–9, 251–2, 259–61, 262–4, 273–5, 289–90, 297–8, 310, 335–6, 341, 351.

[14] R. 179, 186–8, 200, 210, 218, 220, 227, 233, 244–5, 249, 251, 255, 265, 292, 305, 329, 339–40.

pellants with advertisers is the case of the First Federal Savings & Loan Association. In November 1948 the First Federal undertook to sponsor a "Polish Hour" over WEOL. The secretary-manager of the First Federal testified that a representative of the Journal called on him in January 1949 and "mentioned the fact that if we advertised on the radio, we could not advertise in the Journal" (R. 259). Faced with this choice, the Board of Directors of the First Federal "decided then to stay with the newspaper because we *had to use the newspaper,* in fact, for our publication of meetings and our annual statements" (R. 260; Emphasis supplied). In another instance the Journal's coercive power was sufficient to force a motion picture exhibitor to discontinue use of the radio station as an advertising medium despite the fact that he was a stockholder of WEOL (R. 349-51).

The lengths to which the Journal's policy was carried is shown by the case of Sol Dinn. A department store operated by Mr. Dinn commenced advertising over WEOL in the Fall of 1948. When Mr. Dinn refused to discontinue this advertising, the department store's advertising contract with the Journal was cancelled. In addition, the advertising contract of a food market which had *not* advertised over the radio, but in which Mr. Dinn was a part owner, was also cancelled. Mr. Dinn was advised by a Journal

representative that the latter contract was cancelled merely because it bore his signature (R. 300–309). Appellants also took exception to the acceptance by the Journal's advertisers of radio time offered gratuitously by the radio station (R. 324–7), and even objected to the reporting on a local news broadcast over WEOL of the name of a Journal advertiser as the donor of a gift on a March of Dimes program (R. 354–7).

In addition to refusing to accept advertisements of those advertisers who also patronize WEOL, appellants took direct action against the radio station. They refused to print WEOL's logs as paid advertisements (Fdg. 20, R. 531–2) although the Journal has regularly printed advertisements by Cleveland radio stations and carries the logs of some Cleveland radio stations in its news columns (Fdg. 20, R. 531–2; R. 439). And an effort by a representative of the station to place a paid display advertisement in the Journal seeking employees to staff the radio station was unsuccessful (R. 203–7).

Appellant Samuel Horvitz, the only witness called by the defense, has been described by the court below as "the dominant figure in the operation of the Journal" (R. 507). His testimony represents the only evidence offered by appellants to explain their conduct. That testimony, and the credibility of appellant Samuel Horvitz, must

be carefully weighed in any appraisal of appellants' motives in refusing to permit Journal advertisers to utilize the facilities of WEOL. Accordingly, Horvitz's testimony and the apparent conflicts therein will be reviewed here in some detail.

Appellant Samuel Horvitz described the Journal's policy of cancelling contracts and refusing advertisements of WEOL advertisers as one of protecting the Lorain market (R. 418–19, 440–1).[15] That policy was outlined in an affidavit filed by him in this case (R. 104):

> Based upon the belief that a strong, healthy business and shopping district is

[15] This was also the explanation generally given the advertisers—where any explanation at all was made (R. 507). See testimony of advertisers cited *supra*, pp. 13–14. Appellants appear to have taken the position that since the Journal looked out for the interests of Lorain merchants *vis-à-vis* their competitors, it was the advertisers' duty to help fight the radio station. Thus, a Lorain advertiser testified that he was told by a Journal representative that "inasmuch as the Lorain Journal had never allowed outside used car dealers to advertise in their paper that they felt they were justified *in fighting fire with fire*, that I could make my choice, I could either advertise on the radio or the Lorain Journal, but I couldn't do both" (R. 335). (Emphasis supplied.)

Appellant Samuel Horvitz also suggested that one purpose of the Journal's policy was to offer merchants the opportunity to give radio a fair test as a medium of advertising (*supra*, pp. 12–13; R. 436–7), and some advertisers were so told (*e.g.*, R. 251, 310, 335). The court below characterized this assertion as "too specious for any comment other than that it is unworthy of belief and unworthy of the astuteness and sharp business intelligence noticeably displayed on the witness stand" by Horvitz (R. 507).

> important to the well-being and continued growth and development of the community, and that anything that tends to impair the community's business is detrimental to that community, it is the policy of the Lorain Journal to protect the Lorain market in the interest of local business houses. To accomplish this the Lorain Journal strives to build up the Lorain market by encouraging patrons of local stores, *by attempting to attract business into the Lorain market* and *by rejecting the advertisements of out of town establishments that would tend to withdraw business from the Lorain market.* [Italics supplied.]

Horvitz testified under direct examination that the Journal did not "accept advertising from the Elyria or Cleveland merchants that will in any way, shape, or form conflict with our Lorain merchants" (R. 406), and that the Journal had refused proffered advertisements from Cleveland or Elyria stores "unless it was some small item that had in no way conflicted with any of our advertisers in Lorain" (*ibid.*). And on cross-examination he testified that prior to the trial he used to read the Journal very thoroughly and, in fact, that he tried to read it every day (R. 444). Moreover, the witness testified that the employees of the Journal had been fully advised of this policy; that he had discussed it "time and again" with Journal employees; and that, to the best of

his knowledge, they consistently followed this policy (R. 440).

Despite this assertedly firm advertising policy, the witness admitted on cross-examination that in the month of January 1950 alone more than twelve advertisements from Elyria and Cleveland merchants were run in the Journal (R. 447–9). In addition, in December 1949 and March 1950, he admitted, many other advertisments of merchants in these cities had been run in the Journal (R. 449, 445–6). The only explanation offered for the repeated departures in practice from the purported policy was that such departures were "contrary to the instructions that I issued" (R. 447).

Appellant Samuel Horvitz testified that WEOL was an Elyria radio station and that advertising through that medium would tend to break down the Lorain market (R. 419). The record discloses, however, that WEOL was licensed by the Federal Communications Commission to serve, *inter alia,* the Lorain community (R. 25–6), that WEOL maintains a studio in Lorain (R. 25), there was undisputed testimony of Lorain merchants that use of WEOL would enable them to reach many more of the purchasing public than could be reached through the Journal alone, and that being foreclosed from use of WEOL put them at a competitive disadvantage

and was harmful to their business (R. 200, 218, 265).[16]

The district court did not find appellants' explanations of their conduct believable. It stated that the "same rationalizations" (*i. e.*, that the Journal's policy was to require advertisers to give the radio a fair trial, or to protect Lorain merchants by preserving the integrity of the Lorain market) "were advanced to this Court as the justifications for the behavior of the defendants, and this Court, like the Lorain merchants to whom they were first presented, is not convinced" (R. 507). With respect to the protection of the Lorain market, the court observed (*ibid.*):

> That the Journal was attempting to create an economic oasis in Lorain seems incredible, and it is difficult for the Court to see how the defendants could reasonably ascribe this activity to a benevolent desire to protect the Lorain merchants from themselves where the obvious result was to deprive those merchants of a channel which might attract additional business to their market at the very time that mer-

[16] Appellant corporation apparently felt differently about the maintenance of separate Lorain and Elyria trading areas when it applied for a radio license of its own (*supra*, p. 9). The application, which is a public record on file with the Federal Communications Commission, discloses that both Elyria and Lorain were proposed to be served. Exhibit E to Application of the Lorain Journal Company for a New Station in Lorain, Ohio, pp. 4, 8. See R. 434.

> chants in neighboring communities served by WEOL were using it for that purpose.

And with respect to the appellants' ultimate motives the court concluded (*ibid.*):

> From the evidence there can be no doubt that the policy was as uncomplicated in purpose and as lacking in subtlety as the profit motive itself: the Journal sought to eliminate this threat to its pre-eminent position by destroying WEOL.

c. Interstate commerce involved

Although appellants challenge the district judge's ultimate finding that WEOL is engaged in interstate commerce, they do not challenge the detailed subsidiary findings upon which that ultimate finding was based, or the findings with respect to the interstate aspects of the Journal's operations. The findings show that the business activities of WEOL and the Journal had the following interstate facets:

WEOL broadcasts in interstate commerce, and its broadcasts are heard with a degree of regularity by many persons resident in southeastern Michigan. WEOL customarily presents commercially sponsored broadcasts of sporting events taking place in states other than Ohio. In 1949 over 100 such broadcasts were transmitted in interstate commerce from places outside Ohio through a "basic station" in Cleveland to WEOL

for relay to its listeners wherever located (R. 28, 60). About 65 percent of WEOL's broadcast time is devoted to playing of music broadcast by means of electrical transcriptions which are leased and shipped to the Elyria-Lorain Broadcasting Company in interstate commerce. Substantial payments are made annually by the broadcasting company to holders of copyrights of such transcriptions. About 10 to 12 percent of the broadcast time of WEOL is devoted to broadcast of news, world-wide in coverage, gathered by the United Press Associations and sent in interstate commerce to WEOL.[17] (Fdgs. 26–28, R. 533.)

Substantially all of the income of the Elyria-Lorain Broadcasting Company is derived from payment for its broadcasts of advertisements for the sale of goods and services. About 16 percent of this income is received pursuant to advertising contracts between WEOL and persons outside Ohio. Pursuant to these contracts there is a continuous flow in interstate commerce of advertising copy, transcriptions and other materials.[18] (Fdg. 24, R. 532.)

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[17] In a relatively few instances WEOL broadcasts programs advertising the sale of goods and services by suppliers outside Ohio. As a result of these broadcasts, orders are received by those out-of-state suppliers from Ohio residents for direct shipment of goods and services. (Fdgs. 23, 25, R. 532.)

[18] Many merchants who desired to advertise over WEOL but refrained from or ceased doing so because of the activities

News and features gathered from various parts of the United States and other countries are transmitted in foreign and interstate commerce to appellant corporation for publication in the Journal. Advertising copy, matrixes, checks and other documents and materials are shipped from various parts of the United States in interstate commerce to appellant corporation, pursuant to advertising contracts between appellant corporation and national advertisers or their agencies.[19] (Fdgs. 21, 22, R. 532.)

SUMMARY OF ARGUMENT

I

The findings of the district court and the record conclusively establish that appellants engaged

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of appellants occasionally receive specific orders from customers in Lorain and forward them to suppliers outside Ohio. Pursuant to these orders the goods are shipped in interstate commerce direct to Ohio customers, or are shipped to merchants in Lorain County for delivery to the customers (Fdg. 25, R. 532–3).

[19] Advertising at compensatory rates is important to the operation of the Journal. Advertising accounted for approximately two-thirds of its gross income in 1949 (Gov. Ex. 254; R. 491–2). Approximately 10 percent of that portion of the Journal's income derived from advertising is from so-called national advertisers (*ibid.*). Within 20 months preceding the trial the Journal has been party to contracts with at least 84 national advertisers (Gov. Exs. 170–253, not printed) and each of these advertisers and its agents are located outside the State of Ohio (R. 369–373). Pursuant to these contracts the advertising copy and the checks sent in payment for the advertising have been sent to the Journal from outside the State of Ohio (R. 375).

in a deliberate course of coercive action designed to destroy the broadcasting company. The explanations offered by appellants for their conduct were properly rejected by the trial court as incredible. Appellants, having sought to exclude from the market the Journal's only Lorain competitor in the daily dissemination of news and advertising, have attempted to monopolize commerce. *Associated Press* v. *United States*, 326 U. S. 1; *American Tobacco Co.* v. *United States*, 328 U. S. 781.

Appellants have misused the Journal's monopoly position as the only daily newspaper in Lorain to attempt to secure a greater monopoly by making the Journal the only Lorain outlet for the daily dissemination of news and advertising. Monopoly power, however lawfully acquired, may not be used "to foreclose competition, to gain a competitive advantage or to destroy a competitor." *United States* v. *Griffith*, 334 U. S. 100, 107.

II

Appellants have attempted to monopolize a part of *interstate* commerce in violation of Section 2 of the Sherman Act. The broadcasting company is engaged in the interstate business of transmitting and receiving intelligence across state lines. *National Broadcasting Co., Inc.* v. *United States*, 319 U. S. 190; *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S.

650. And WEOL and the Journal are both Lorain outlets for interstate commerce in news and advertising. Appellants have attempted to destroy the broadcasting company, and thereby make the Journal the sole Lorain outlet for daily interstate news and advertising which flows into that city. Imposition of artificial restrictions upon the outlets of interstate commerce has been condemned by this Court. *Associated Press* v. *United States*, 326 U. S. 1, 18–19.

The interstate commerce here involved is substantial. As an inseparable part of its operations WEOL regularly broadcasts in interstate commerce. And the daily flow of news, advertising, transcriptions and other materials in interstate commerce to the Journal and WEOL is appreciable. *United States* v. *Yellow Cab Co.*, 332 U. S. 218; *Montague & Co.* v. *Lowry*, 193 U. S. 38.

Even if the initial impact of appellant's activities were upon intrastate transactions, the Sherman Act would be applicable because of the effect upon interstate commerce. The Sherman Act exercises the full power of Congress under the Commerce Clause with respect to commercial restraints and monopolies (*United States* v. *Frankfort Distilleries*, 324 U. S. 293, 298) and both Sections 1 and 2 reach any activity, however local in inception, which has an appreciable impact upon interstate commerce. *Mandeville*

Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219.

III

a. The relief ordered by the district court is constitutional. The First Amendment does not insulate publishers from prosecution for violation of the general laws of the United States. *Associated Press* v. *United States*, 326 U. S. 1. The judgment in no way circumscribes the freedom of appellants to publish news as they desire it published, to enforce editorial policies of their own choosing, and to exercise the right to reject advertising because it is offensive in substance or because the advertisers are not the sort of persons with whom they wish to deal. The judgment properly prohibits appellants from refusing to deal with an advertiser where the *basis* for such refusal is the desire to force the advertiser not to have business relationships with other advertising media.

b. The scope of the injunction is not unduly broad. Although it is true that the unlawful conduct found by the district court in this case to have been proved was directed against WEOL, the injunctive relief properly also forbids similar activities if directed against any other advertising media. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409; *Local 167* v. *United States*, 291 U. S. 293.

ARGUMENT

I

APPELLANTS HAVE ATTEMPTED TO MONOPOLIZE THE LORAIN OUTLETS FOR DAILY DISSEMINATION OF NEWS AND ADVERTISING BY DESTROYING WEOL

One who effectively excludes (or seeks to exclude) others from a market thereby monopolizes (or attempts to monopolize) commerce. *Associated Press* v. *United States*, 326 U. S. 1; *American Tobacco Co.* v. *United States*, 328 U. S. 781; see also *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (C. A. 2); *United States* v. *National City Lines*, 186 F. 2d 562 (C. A. 7), certiorari denied, 341 U. S. 916.

From 1932, when the assets of the only competing newspaper in Lorain were purchased, until 1948, when WEOL commenced operations, the Journal was the sole outlet for the daily dissemination of news and advertising located in Lorain, Ohio. The record shows that appellants fully appreciated that the "quasi-monopolistic" position which they then enjoyed had been conducive to the enjoyment of "a profitable operating experience" (*supra*, pp. 7, 9). And the findings of the district court establish that when WEOL threatened that position, appellants embarked on a war of attrition against the broadcasting company in an effort to destroy it, and thereby to restore the preeminent position of the Journal (*supra*, p. 10).

In their brief to this Court appellants paint a picture of a "life and death struggle" between WEOL and the Journal from which only one protagonist can emerge (Br. 10, 20–21). As might be the case of two men on a raft without food, the suggestion seems to be that one must devour the other or perish.[20] But appellant Samuel Horvitz offered no such rationalization in his affidavit and testimony in the court below. And the record is bare of any evidence that WEOL and the Journal could not operate successfully as complementary media, as newspapers and radio stations customarily do in other cities (cf. Appellants' Br. 20). There is no evidence that WEOL had attempted to take away Journal advertisers (cf. Appellants' Br. 2, 5, 19), or that WEOL had made "steady inroads" on the Journal's advertisers (cf. Appellants' Br. 6). Indeed, since appellants' campaign against WEOL began immediately after the station commenced broadcasting (Fdgs. 16, 17, R. 531), it seems improbable that appellants were acting in retaliation against WEOL's asserted "destructive competition" (Appellants' Br. 20).[21]

[20] Indeed there is even the suggestion that the Federal Communications Commission must have licensed WEOL with the intention that the station should take business away from the Journal (Br. 10, 14–15). Elsewhere it is suggested that this may have been the Commission's plan (Br. 19, 20). There is no support in the record for these suggestions.

[21] If appellants' accusations against WEOL were true, and were documented, appellants would still not be exempted from the antitrust laws. Even tortious conduct does not give

Appellants do not deny that they performed the coercive acts described in the findings. It is undisputed that they capitalized on the desire and need felt by Lorain merchants for daily newspaper advertising, and on the monopoly position of the Journal in that field in Lorain to compel a boycott of WEOL by Lorain merchants. And witnesses have testified to the direct harassment of WEOL achieved by closing the Journal's columns to advertisements and program logs of the station (*supra*, p. 16). While appellants carefully avoid any frontal attack upon the district court's finding that they intended to destroy the broadcasting company (see Specifications of Errors, Br. 9), they continue to stress in this Court the explanations of their conduct which that court found incredible (Br. 2, 6). Moreover, appellants never come to grips with the legal consequences which flow from a deliberate attempt to destroy an interstate competitor. Their entire discussion of the case seems premised on the assumption that their war against WEOL was a local war on the station in its local aspects. We submit that the trial court's finding of the larger intent to eliminate the broadcasting company completely is clearly correct.

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competitors an unrestricted hunting license against the tortfeasor. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 468; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 214.

It is difficult to imagine clearer proof of intention to ruin a competitor (absent a confession in open court) than is presented here. It is beyond debate, and appellants concede (Br. 10, 14), that WEOL depends heavily on revenue from local advertisers in the communities which it serves (Fdg. 24, R. 532). And Lorain is much the larger of the two principal communities served by the station.[22] Appellants compelled Lorain merchants who wished to advertise in the Journal to refrain from advertising over WEOL, and the uncontroverted testimony of many advertisers establishes that, although wishing to use both media, they used the Journal exclusively when forced to a choice (*supra*, p. 14). In light of this evidence, it was not unreasonable for the trier of facts to conclude that the natural and probable consequence of appellants' course of conduct would be to drive the broadcasting company out of business. And it would have been nothing short of naive to conclude that appellants had any other objective.[23]

The principal explanation[24] of the WEOL boy-

[22] The 1950 census shows the population of Elyria as 30,307, while that of Lorain was 51,202.

[23] See, *e. g.*, *supra*, pp. 14–16.

[24] It must be observed that appellants have not offered any consistent explanation for their actions. See affidavit of appellant Samuel Horvitz (*supra*, pp. 17–18) and testimony of advertisers who were subjected to pressure by appellants

cott has been that it was designed to protect the integrity of the Lorain market (*supra*, pp. 17–18). One difficulty with this explanation is that it is unclear who was being protected against whom. Appellants' purported policy of refusing to carry advertisements of out-of-town merchants in the Journal [35] may readily be explained as an effort to prevent Lorain purchasers from being lured away from Lorain stores. But the refusal to permit Lorain merchants to advertise over WEOL would seem to be a method of hurting rather than helping those merchants. It deprives them of the cumulative effects of advertising over more than one medium. And, as the court below pointed out, competing stores in neighboring communities are free to use the radio station.[36] To deny the same privilege to the Lorain merchant

(*supra*, pp. 13–14). In many instances no excuse at all was offered to the prospective advertisers for the preemptory refusal to accept the advertising if they used the radio station (R. 507).

[35] The existence of this policy in more than name is doubtful in view of the repeated deviations from it which have been established (*supra*, p. 19).

[36] The court said (R. 507) that

"it is difficult for the Court to see how the defendants could reasonably ascribe this activity [*i. e.*, to prevent Lorain merchants from using WEOL] to a benevolent desire to protect the Lorain merchants from themselves where the obvious result was to deprive those merchants of a channel which might attract additional business to their market at the very time that merchants in neighboring communities served by WEOL were using it for that purpose."

is to send him into the competitive arena with one hand tied behind his back.[27]

The defense that protection of the Lorain market, rather than destruction of WEOL, motivated appellants is subject to a further difficulty. If appellants really wanted to "protect" the Lorain market from being reached by out-of-town advertisers, that purpose obviously could not be accomplished merely by keeping Lorain merchants off the air. If, and only if, appellants' boycott succeeded in silencing WEOL entirely, would the desired result be achieved. Thus, whatever their ultimate objective, appellants must have had as one of their purposes the destruction of WEOL.

Appellants put forth an alternative, but equally disingenuous explanation of their conduct, *i. e.*, that the Journal's advertising policy was designed to compel advertisers to give radio a fair trial (*supra*, pp. 12–13).

In fact, however, appellants did not close the Journal's columns to WEOL advertisers for a limited test period only. WEOL advertisers were denied use of the Journal's facilities until, and unless, they ceased using the radio station.

[27] Nor can the policy of compelling advertisers not to advertise over WEOL be described as simply an effort to discourage patronage of Elyria businesses (cf. R. 418–9). WEOL is not purely an Elyria business. It has a Lorain broadcasting studio, and was specifically licensed by the Federal Communications Commission to serve Lorain (*supra*, pp. 9–10).

Appellants were adamant in their refusal to allow advertisers to use both media, although many of them strongly desired to do so (*supra*, p. 14). Hence, the "fair trial" contemplated by appellants was an opportunity for advertisers to see if they could get along without use of the Journal. The hapless prisoner who is offered bread without water or water without bread is hardly being asked to give one or the other "a fair trial." The district court's rejection of the fair trial explanation as "unworthy of belief" (*supra*, p. 17) was plainly correct.

Not only is the trial court's finding as to intent and motive beyond successful challenge, but the correctness of the decision below does not turn upon this finding. Whether or not a person affirmatively desires particular results from his actions, he is responsible under the antitrust laws for the natural and probable consequences of the acts he intentionally performs. *United States* v. *Patten*, 226 U. S. 525, 543.[28] Even if it be assumed, *arguendo*, that appellants' conduct was motivated by some ill-conceived conception of

[28] Accord: *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 173; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49; *United States* v. *Masonite Corp.*, 316 U. S. 265, 275; *United States* v. *Griffith*, 334 U. S. 100, 105–106; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 406 (C. A. 7), certiorari denied, 314 U. S. 618; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C. A. 2); *United States* v. *National City Lines, Inc.*, 186 F. 2d 562 (C. A. 7), certiorari denied, 341 U. S. 916.

what is of benefit to Lorain merchants, rather than by a desire to expand the Journal's daily newspaper monopoly to a monopoly of the daily dissemination of news and advertising in Lorain, the fact remains that the ruin of the broadcasting company and the expansion of the Journal's monopoly is the natural and predictable outcome of appellants' activities.

Appellants suggest (Br. 8) that it would be impossible for them to monopolize broadcasting when the Journal was not in the broadcasting business. However, both the Journal and WEOL are engaged in the dissemination of news and advertising, which is the commerce involved. And appellants can hardly at the same time contend on the one hand that the Journal and WEOL are engaged in a life and death struggle for the same business, and, on the other, that the businesses are wholly distinct and unrelated.

It is immaterial that it may not be possible to demonstrate with mathematical certainty that appellants' activities would have destroyed the broadcasting company if they had not been halted by the court below. As this Court stated in *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810–11:

> * * * Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.

> * * * A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act, although such restraint or monopoly may not have been actually attempted to any harmful extent. See *United States* v. *International Harvester Co.*, 214 F. 987, *id.*, 274 U. S. 693.

The illegality of appellants' conduct thus does not turn upon the success of their efforts to monopolize. It is sufficient that if they had succeeded in the course of conduct deliberately pursued, the Journal's only competitor as a daily news and advertising outlet in Lorain would have been eliminated. The natural, probable and intended result of appellants' acts was monopolization of commerce in news and advertising. The acts themselves constitute an attempt to monopolize.

Appellants ask this Court to sanction the sort of ruthless, unrestricted abuse of economic power which led to the enactment of the Sherman Act. They apparently think it inconceivable that a radio station and a newspaper could exist side by side in Lorain, both serving a useful purpose.[29] Although they offered no evidence to show that WEOL in any way threatened the Journal's existence, appellants now speak of fighting "destructive competition with the only weapon" the Journal has (Br. 20). And they advance the

[29] At least, appellants took that view after the appellant corporation's own application for a radio license was denied, (*supra*, pp. 9, 20).

thesis that "Control of a local business situation is itself a property right" (*ibid.*).

This Court has taken a different view with respect to the use and abuse of monopoly power. The "use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or *to destroy a competitor,* is unlawful." *United States* v. *Griffith,* 334 U. S. 100, 107 (italics supplied). In the *Griffith* case the defendants insisted that distributors give them preferential rights in towns where they had competition, or else defendants would not give the distributors any business in the towns where they had the only theatre. This Court outlawed the practice. Thus, although the defendants had "control of the local business situation" in each of the towns in which they controlled the only first run theatre, they were not permitted to use the leverage thereby created to foreclose competitors in other towns from getting first run films. This Court did not think that the defendants had a "property right" to abuse their monopoly power.

In the long line of cases of which *International Salt Co.* v. *United States,* 332 U. S. 392, is a recent example, this Court has consistently refused to permit a lawful monopoly secured by the patent laws to be extended so as to monopolize or restrain trade in goods or services not subject to the patent grant. In the *International Salt* case, the Salt Company entered into a series

of contracts with lessees of its patented salt machines requiring them to purchase from it all their salt requirements when dispensed through the machines. Here, appellants in effect incorporate an exclusive dealing provision in their advertising contracts. In order to use the Journal, advertisers must boycott WEOL, just as in *International Salt* persons wishing to use the defendants' machines were forced to boycott competing salt suppliers.

Appellants also vigorously assert (Br. 19–23) an inviolate right to select their customers, and to refuse customers for any reason or no reason. It may be true in a general way that a trader engaged in private business has the right freely to exercise complete discretion as to the parties with whom he will deal, and hence that a newspaper normally may reject any advertising it desires to reject. But, like other lawful acts, a refusal to deal may be part of a larger unlawful scheme, as is shown by the very passage quoted by appellants (Br. 21) from *United States* v. *Colgate & Co.*, 250 U. S. 300, 307. Cf. *Associated Press* v. *United States*, 326 U. S. 1, 15. The right to refuse to deal is a right limited by the Sherman Act where the rejection is made pursuant to a plan to monopolize interstate commerce. *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291. In any event, the power to refuse to deal at all does not include the "lesser" power to deal on

unlawful conditions. Cf. *United States* v. *Masonite Corp.*, 316 U. S. 265, 277.[30]

II

APPELLANTS HAVE VIOLATED SECTION 2 OF THE SHERMAN ACT

Appellants' principal defense to the charge in the complaint found by the court below to have been established is that their activities, however monopolistic, are beyond the reach of the Sherman Act. They assert that the coercive acts performed by them involved only the prevention of local advertising over WEOL which is, at most, local monopolization. And they vigorously defend the asserted rights to control the local business situation involved, and to do business or refuse to do business with anyone they please. The position urged by appellants overlooks the

[30] In further support of this argument, appellants cite *Mogul S. S. Co.* v. *McGregor*, 21 Q. B. Div. L. R. 544, 553, for the proposition that a trader may enter into exclusive dealing arrangements with its customers. Whatever may have been the status of the law on this subject in England in 1888, the governing law on the subject in the United States today is found in statutes of Congress and decisions of this Court. Cf. Section 3 of the Clayton Act, 38 Stat. 730, 15 U. S. C. 14; *Standard Oil Co. of California* v. *United States*, 337 U. S. 293. Appellants cite a number of federal cases upholding refusals to deal (Br. 21). In none of these cases (except *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738 (C. A. 3), in which the plaintiff ultimately prevailed) did the courts find a deliberate attempt to destroy a competitor or to acquire a monopoly.

fact that the broadcasting company is an interstate business entitled to the protection of the Sherman Act, and that the Journal and WEOL are the main outlets in Lorain for the dissemination of interstate news and advertising. The district court found, and the record establishes (Point I, *supra*), that appellants have attempted to destroy the broadcasting company; the result of appellants' conduct, if successful, would be a monopolization of interstate outlets in Lorain.

Appellants challenge the finding of the court below that WEOL broadcasts in interstate commerce, but they cannot and do not deny that the station's broadcasts are regularly heard outside Ohio, that the station regularly serves as the final step in the interstate transmission of programs originating in other states (*supra*, pp. 21–22),[31] that it regularly broadcasts news originating outside Ohio,[32] or that it carries advertising pursuant

[31] During the year preceding the trial, WEOL carried commercially sponsored broadcasts of 79 baseball games originating in six other states and the District of Columbia, and 30 hockey games originating in seven other states (Gov. Ex. 2, R. 469). Appellants make some point (Br. 7) of the fact that the sports broadcasts are relayed to WEOL from another Ohio station rather than directly from out of state. It can hardly be suggested, however, that the interstate commerce in intelligence comes to rest during the instant it is passing through the so-called "basic" station in Cleveland. Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 568.

[32] Appellants' suggestion that because the news is teletyped from Cleveland and Columbus, Ohio, it is not in interstate commerce, is almost frivolous. The record shows that there

to contracts with persons outside of Ohio (*supra*, p. 22). Thus there is regular interstate broadcasting to and from Ohio in which WEOL participates. No more is necessary to show that WEOL is an interstate business. It is settled that radio broadcasting is commerce, and that interstate broadcasting is interstate commerce. *National Broadcasting Co., Inc.* v. *United States*, 319 U. S. 190; *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650;[33] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 279.

Appellants rely upon one federal case and two

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is a continuous flow of news from outside Ohio through Cleveland and Columbus to WEOL, and that the processing given the news in those cities is trifling (R. 165–70). In any event, even extensive processing does not serve to break the flow of interstate commerce. Cf. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219; *Swift & Co.* v. *United States*, 196 U. S. 375.

[33] In the *Fisher's Blend* case this Court considered the question whether, independently of any question regarding the regulatory power of the Federal Communications Commission, the radio station there involved was operating in interstate commerce. The Court stated (297 U. S. at 654–5):

"* * * In all essentials its [the radio station's] procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. * * * the transmission of information interstate is a form of 'intercourse' which is commerce * * *.

"* * * The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays."

state cases relating to state taxing power to support their contention that WEOL is not engaged in interstate commerce (Br. 26). *Western Livestock* v. *Bureau of Internal Revenue,* 303 U. S. 250; *Albuquerque Broadcasting Co.* v. *Bureau of Revenue,* 51 N. M. 332, 184 P. 2d 416; *Beard, Collector* v. *Vinsonhaler,* 215 Ark. 389, 221 S. W. 2d 3. But these cases at most stand for the proposition that the activities of a radio station may be partly intrastate in character, and therefore subject to *state* taxation. Here the appellants set out to destroy the broadcasting company entirely; if their efforts were successful, it is plain that the interstate portion of WEOL's commerce would perish with the rest. Moreover, these cases have no bearing on the applicability of the Sherman Act. In each of them the question was whether it was constitutional for various states to impose a tax on the gross income of, or a flat franchise tax upon, radio broadcasting stations or upon periodicals. It should require no extended discussion to demonstrate that the area for taxation left to the states by the Constitution and the area covered by the Sherman Act are not mutually exclusive. *Binderup* v. *Pathe Exchange Inc.,* 263 U. S. 291, 311; *Stafford* v. *Wallace,* 258 U. S. 495, 525-8; *Swift & Co.* v. *United States,* 196 U. S. 375, 400. Indeed, the very federal case cited by appellants establishes

this point. *Western Livestock* case, *supra*, at 254.[34]

The effort of appellants to treat their campaign against the radio station as a local affair, addressed only to the local aspects of WEOL's activity, cannot be sustained. Appellants, having deliberately set out to destroy the broadcasting company by preventing it from receiving any revenue from Lorain merchants, cannot be heard to say that they intended to destroy only its local operations. As pointed out above, the broadcasting company is a single economic entity whose interstate activities will cease if the company is destroyed. Had appellants' activities remained unchecked, the probable result would be the elimination of *all* of WEOL's activities—interstate and intrastate. And the Journal, which is also a Lorain outlet for interstate commerce in news and advertising (*supra*, p. 23), would thereby have become the only such daily outlet in Lorain. Thus by destroying WEOL,

[34] The court in the *Albuquerque Broadcasting* case, *supra*, held that spot advertising supplied by national advertisers and broadcast by means of transcriptions shipped into New Mexico from outside the state constituted interstate commerce, and the record in the instant case shows that WEOL engaged in identical types of broadcasting (*supra*, p. 22). And although this Court in the *Western Livestock* case held that the publishing of magazine advertising is peculiarly local and distinct from its circulation, it also held that contracts for advertising with out-of-state advertisers resulted in the transmission of intelligence and materials in interstate commerce.

appellants would have succeeded in monopolizing a part of interstate commerce.

The imposition of artificial restrictions upon the outlets of interstate commerce has been condemned by this Court repeatedly. *Associated Press* v. *United States*, 326 U. S. 1, 18–19 and cases cited; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226–7. In the *Associated Press* case, *supra*, the combination prevented non-member newspapers from getting interstate news from the AP. In the *Yellow Cab* case, *supra*, local taxi companies were foreclosed as outlets for interstate cab sales by all but one manufacturer (332 U. S. at 226). Here, appellants' activities threaten to foreclose WEOL as a daily interstate outlet for news and advertising by putting it out of business, and thereby to make the Journal the only such outlet in Lorain.

Appellants' contention that the interstate commerce here involved is so insubstantial as to be outside the protection of the Sherman Act is also unsound. As an inseparable part of its operations WEOL regularly broadcasts in interstate commerce and is heard by listeners in Michigan.[35]

[35] Appellants' contention that WEOL's interstate broadcasts are incidental to the function for which it was licensed (serving the Elyria-Lorain area) and therefore beyond the protection of the Sherman Act, is wholly unsound. In the first place, the argument at best applies only to WEOL's interstate transmissions, not to the interstate broadcasts which it receives from outside Ohio and relays to its listeners. In the second place, it is not contended, nor could it be contended,

And both WEOL and the Journal are important outlets for interstate news, national advertising, and advertising of goods and services which are shipped to Lorain in response to such advertising (*supra*, pp. 21–23).[36] Moreover, the money value of their activities as interstate outlets cannot be shrugged off as insubstantial or *de minimis*.

In the year 1949 the amount of revenue derived from national advertising in the Journal amounted to approximately $68,000 or 10 percent of its total advertising revenue (Gov. Ex. 254, R. 491), while 16 percent (or $28,000) of WEOL's total gross revenue of $175,000 in 1949 was obtained from national advertising (R. 46). WEOL spends about $10,000 annually for United Press news and musical transcriptions (Gov. Exs. 46–48, 50–55, not printed), while the Journal spends $9,000 annually for national news, comics, features, and syndicated columns (Gov. Exs. 121, 122, 123–128, not printed).

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that WEOL's interstate broadcasts are beyond the authority granted to it by the Federal Communications Commission since the strength of its broadcast signal and the direction of its antennae are regulated by the Commission. Finally, the test of whether interstate activity is within the coverage of the Sherman Act is whether it is substantial or appreciable, not whether the interstate activity is a primary or an incidental function of the particular business involved.

[36] As well as being an important outlet for interstate news and advertising, the Journal regularly circulates its newspaper to about 165 subscribers located outside of Ohio (*supra*, p. 7). Cf. *Mabee* v. *White Plains Publishing Company*, 327 U. S. 178.

In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226, this Court held:

> Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. * * *

And see *Montague & Co.* v. *Lowry*, 193 U. S. 38.[37] Again, in *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738 (C. A. 3), where a combination involving control only of the "first-run" motion picture theatres in the centralized theatre district of Philadelphia was held to violate Section 2, the court said (150 F. 2d at 744):

> We know of no authority which sanctions what would otherwise be an illegal monopoly simply because it operates in a single

[37] In the *Lowry* case, the plaintiffs, dealers in tiles in San Francisco, brought suit to recover damages for the injury resulting from the defendants' combination, which prevented or tended to prevent the plaintiffs from purchasing unset tiles. This Court affirmed a judgment for the plaintiffs which was based upon the defendants' violation of both Sections 1 and 2 of the Sherman Act (see *Lowry* v. *Tile, Mantel and Grate Assn.*, 106 Fed. 38, 45-46 (N. D. Calif.)) although the sale of unset tiles was less than 1 percent of the business of tile dealers in San Francisco, and the jury had found the plaintiffs' injury to be only $500.

city or a particular part of a city and affects only a part of an industry involved. There is no such limitation on the effect of the anti-trust laws.

Finally, appellants' contention (Br. 11) that monopolization of outlets of interstate commerce is purely local activity which does not involve "direct restraints" on interstate commerce must also fail. This contention rests on an interpretation of the Sherman Act long discarded by this Court. With reference to commercial restraints, Congress, in enacting the Sherman Act, "left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 298;[38] *United States* v. *South-Eastern Under-*

[38] In support of the contention that their conduct may have restrained intrastate, but not interstate, commerce, appellants rely upon *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, *Levering & Garrigues* v. *Morrin*, 289 U. S. 103, *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, and *Industrial Assn.* v. *United States*, 268 U. S. 64 (Br. 17). These cases were clearly distinguished by this Court in the *Frankfort Distilleries* case, where defendants had been indicted for fixing the prices at which spirituous liquors and wines were to be sold at retail in the State of Colorado. Defendants argued that since the price-fixing applied only to retail sales, which were wholly intrastate, their conduct was not covered by the Sherman Act. This Court referred particularly to the *Industrial Association* and *Levering* cases, relied upon by appellants here, saying that they (pp. 297–8):

"* * * involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other hand, the sole ultimate object of respondents' combination in

writers Assn., 322 U. S. 533, 558–9; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435. And the commerce power is fully adequate to deal with any activities, however local in inception, which have an impact upon interstate commerce. *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1; *United States* v. *Wrightwood Dairy Company*, 315 U. S. 110; *Wickard* v. *Filburn*, 317 U. S. 111; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219.

It is now too late to argue that interstate commerce must be directly restrained or monopolized in order to bring the Sherman Act into play. In *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company, supra* (case under Sections 1 and 2), this Court stated (334 U. S. at 234) that "given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence."[39] We sub-

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the instant case was price fixing or price maintenance." In the present case the objective is the equally commercial one of eliminating a competitor and monopolizing a line of commerce.

[39] In the *Mandeville* case, this Court held unlawful a conspiracy of sugar refiners to fix the prices which they would

mit that the threatened effect on interstate commerce here is substantial, and is adverse to the paramount congressional purpose of preserving "the right of freedom to trade." *Paramount Famous Corporation* v. *United States*, 282 U. S. 30, 42.

In *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (a Section 1 case) this Court said:

> Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. *If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.* [Italics supplied.]

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pay for beets purchased in California and there refined into sugar. The refined sugar was thereafter shipped in interstate commerce. In that case, as here, it was urged that the activities of the defendants and their purposes were local in character. This Court said (pp. 235–6):

"And even if it is assumed that the final aim of the conspiracy was control of the local sugar beet market, it does not follow that it is outside the scope of the Sherman Act. For monopolization of local business, when achieved by restraining interstate commerce, is condemned by the Act."

And see *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255, 261.

Although appellants argue that the *Stevens* and *Mande-*

Even if it be assumed, *arguendo,* that appellants' ultimate aim was the monopolization of a business locally conducted, and that the pressures exerted by them were locally applied, it is evident that a part of interstate commerce feels the pinch of their efforts. For if the appellants had succeeded in putting the broadcasting company out of business, they would have perfected for the Journal not only a local monopoly of news and advertising in Lorain, but also a monopoly of the Lorain outlets for the interstate news and advertising which daily flow into that city. There can be no more "direct" interference with the interstate activity of a business than to destroy that business (cf. Appellants' Br. 15).

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ville cases do not support the position of the Government, both cases are apposite as to the legal consequences of local monopolization which affects interstate commerce. In the *Stevens* case the principal pressure was applied locally through the refusal to post posters of noncooperating advertisers, and the result of that local pressure was to forestall the transportation of posters in interstate commerce. In the *Mandeville* case the price-fixing arrangements were applicable only to intrastate sales of sugar beets, and the later interstate commerce in sugar was only indirectly affected. In both cases, defendants alleged that the attempted monopolization was purely local, but this Court concluded that Sections 1 and 2 of the Sherman Act had been violated. In the instant case, appellants' pressure was locally applied to achieve a local monopoly, but the result intended by that pressure was the destruction of WEOL, an interstate business. Thus, just as in the *Stevens* and *Mandeville* cases, appellants' attempt to achieve a local monopoly comes within the ban of the Sherman Act. And see *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501.

Appellants seek to distinguish as irrelevant many of the cases cited by the Government on the commerce question on the ground that those cases arose, or were decided, under Section 1 of the Act, rather than Section 2. This line of argument rests on the unsound premise that the reach of the Sherman Act, commerce-wise, is greater under Section 1 than Section 2. This Court has not adopted such a view. *Both* sections 1 and 2 "apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce." *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 279;[40] *Standard Oil Co.* v. *United States*, 221 U. S.

[40] Although appellants argue (Br. 18–19) that the *Indiana Farmer's Guide* case is clearly distinguishable on its facts, the commerce there involved is almost identical to that found in this case. There, as here, advertising was solicited from outside the State of publication; there, as here, publication of such advertising involved the transportation of intelligence and materials in interstate commerce; there, as here, such advertising was disseminated to persons located outside the State of publication (in the instant case through WEOL broadcasts, and in that case through the circulation of the newspapers).

Appellants likewise rely (Br. 18) upon *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.*, 252 U. S. 436, for the proposition that the national advertising contracts involved here do not constitute interstate commerce. That decision relied heavily upon *Paul* v. *Virginia*, 8 Wall. 168, and the line of cases which held that policies of insurance were not articles of commerce, and held the making of such contracts to be a mere incident of commercial intercourse. These decisions were severely limited, if not overruled, by

1, 61. Moreover, even if the premise were correct, the basic findings of the trial court would equally support a judgment under Section 1.[41] While the Government did not try its case on the contract theory, and the district court made no conclusion of law that these arrangements violated Section 1 of the Act, it is settled law that contracts requiring customers to refrain from dealing with a competitor constitute a restraint of trade under the Act.[42] And appellants in effect concede that they accepted advertisers only on condition that those advertisers refrain from utilizing what appellants characterize as "Elyria radio advertising" (Br. 2); moreover, the testimony of the advertisers (*supra*, pp. 13–16) makes it clear that those who thereafter continued or resumed advertising in the Journal did so on the understanding that they would not use WEOL. The Sherman Act is aimed at substance rather

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United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, where this Court decided that "intangibles" can be the subjects of interstate commerce.

[41] Finding 18 (R. 531) establishes that appellants cancelled the advertising contracts of advertisers who used WEOL, and informed other advertisers orally that they could not continue to advertise in the Journal if they advertised over WEOL.

[42] *International Salt Co.* v. *United States*, 332 U. S. 392; *Vitagraph Inc.* v. *Perelman*, 95 F. 2d 142 (C. A. 3), certiorari denied, 305 U. S. 610; *United States* v. *Eastman Kodak*, 226 Fed. 62 (W. D. N. Y.), appeal dismissed on motion of appellants, 255 U. S. 578. Cf. *United States* v. *Griffith*, 334 U. S. 100, 106.

than form. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227. Whether appellants' war against WEOL be characterized as involving contracts in violation of Section 1, an attempt to monopolize in violation of Section 2, or both, the impact on interstate commerce is the same. We have demonstrated above that that impact is substantial, and is sufficient to bring appellants' activities within the reach of the Act.

III

THE RELIEF ORDERED BY THE DISTRICT COURT IS CONSTITUTIONAL AND APPROPRIATE

a. The First Amendment

Appellants invoke the protection of the First Amendment to resist the granting of any effective relief in this case. They apparently contend that the constitutional mandate that "Congress shall make no law * * * abridging the freedom * * * of the press" immunizes from the Sherman Act the use of the monopoly power of a newspaper to attempt to destroy a broadcasting company.[43] The comment of the court below is apposite (R. 514):

[43] Appellants also apparently contend that the requirement that they publish the substantive terms of the judgment in the Journal for a period of weeks is unconstitutional. But it is clear that defendants adjudged to have violated the antitrust laws may properly be required to put the public on notice that they are going to discontinue their unlawful prac-

> It would be strange indeed to pervert the liberty proclaimed by the First amendment into a license for the continuation of a dictatorial course of action designed to suppress another and equally important instrumentality of information and expression. The purposes sought to be served by that Amendment would not survive many such paradoxes.

The First Amendment does not insulate publishers from prosecution for violation of the general laws of the United States. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103; *Associated Press* v. *United States*, 326 U. S. 1; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; *Mabee* v. *White Plains Publishing Company*, 327 U. S. 178; cf. *In re Rapier*, 143 U. S. 110. In *Associated Press* v. *United States*, *supra*, this Court stated that "freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not" (326 U. S. at 20). Similarly, the Constitution does not guarantee the "freedom" to monopolize

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tices. *Timken Roller Bearing Company* v. *United States*, 341 U. S. 593, par. X of judgment; *International Salt Co.* v. *United States*, 332 U. S. 392, sec. V of judgment; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, pars. 3–5 of judgment; *United States* v. *Univis Lens Company, Inc.*, 316 U. S. 241, par. 4 of judgment. The selection of the Journal for such a notice results from its position as the only daily newspaper of wide circulation in the city of Lorain.

the dissemination of news and advertising by destroying a competitor.

The decree prohibits appellants from refusing advertisements for the reason that the advertiser uses some other medium of communication. Appellants now contend that this constitutes a dangerous prior restraint upon the Journal; indeed, they seem to suggest that it involves a species of thought control (Br. 28). But a quite similar provision is found in the proposed judgment which appellants themselves submitted in the court below (Par. I, R. 526). And appellants do not suggest to this Court any alternative relief which would assure that the unlawful practices in which they have engaged will not be resumed.

The judgment of the court below in no way circumscribes the freedom of appellants to publish news as they desire it published, to enforce editorial policies of their own choosing, and to exercise their undoubted right to reject advertising because it is offensive in substance or because the advertisers are not the sort of persons with whom they wish to deal. The judgment merely prohibits the appellants from refusing to deal with an advertiser where the basis for such refusal is the desire to force the advertiser not to continue or to enter into business relationships with another available medium of communication. This illegal practice may be restrained

effectively without affecting the operations of appellants' newspaper as an organ of expression or opinion and without harming the lawful conduct of the Journal's commercial business.

b. The scope of the injunction

Appellants also argue that the injunction is illegal in its terms because it is not limited to discrimination against WEOL and because it prohibits intrastate, as well as interstate, activities against other advertising media. It is axiomatic that the prohibitions of a judgment need not be confined to the precise conduct held to have been unlawful, but should be framed to suppress the unlawful practices and preclude their revival. To that extent the judgment must be broad enough to prevent evasion and to dissipate the effects of the unlawful conduct. *Local 167* v. *United States*, 291 U. S. 293; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; *United States* v. *United States Gypsum Company*, 340 U. S. 76, 88–9;[44] *United States* v.

[44] In the *Gypsum* case it was stated (340 U. S. at 88–9):

"A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited."

Trans-Missouri Freight Assn., 166 U. S. 290, 308; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 727; *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, 437; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409; *May Dept. Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 391; *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

While a court may not "impose penalties in the guise of preventing future violations," this limitation does not mean that the judgment "need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable." *Hartford-Empire Co.* v. *United States*, *supra*.

In the *Local 167* case, *supra*, defendants argued that the judgment was unwarranted because it applied to restraints on commodities not the subject of the conspiracy, and because it covered intrastate conduct. But this Court rejected these arguments, stating (pp. 299–300):

> * * * The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done

or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. The evidence shows that delegates of the unions coerced marketmen to use coops of a company that had or sought to secure a monopoly of such facilities and charged excessive rentals for them. *The lack of specific evidence that coercion has been practiced or is threatened in respect of every detail or commodity is no adequate ground for striking out the clause or for limiting it to a mere specification of the coops.* Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, *appellants may not complain if the injunction binds generally as to related commodities including feed and the like.* * * *

And, maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. *But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act.* * * * [Italics added.]

ONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1951.